

PROHIBITION OF EX PARTE COMMUNICATIONS BETWEEN APPEALS OFFICERS AND OTHER INTERNAL REVENUE SERVICE EMPLOYEES

REV. PROC. 2000-43

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SECTION 1. PURPOSE AND SCOPE

Section 1001(a) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685 (RRA 98), states that "The Commissioner of Internal Revenue shall develop and implement a plan to reorganize the Internal Revenue Service. The plan shall ...

- (4) ensure an independent appeals function within the Internal Revenue Service, including the prohibition in the plan of ex parte communications between appeals

officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers.”

Notice 99-50, 1999-40 I.R.B. 444 (October 4, 1999), set forth a proposed revenue procedure concerning the ex parte communication prohibition. The proposed revenue procedure provided guidance in the form of a series of questions and answers that address situations frequently encountered by the Service during the course of an administrative appeal and invited public comment. The Department of the Treasury and the Internal Revenue Service have considered all comments received, and the proposed revenue procedure has been modified to take into account the concerns raised. Specifically, the scope of permissible communications has been clarified, limitations have been placed on communications between Appeals and certain employees in the Office of Chief Counsel, concerns about communications that take place in the context of multi-functional meetings have been addressed, and other questions and answers have been modified. In addition, new questions and answers have been included to define key terms and clarify responsibilities of the parties, permit taxpayers/representatives to waive the prohibition, and to address certain management issues.

SECTION 2. BACKGROUND

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In 1927, the Internal Revenue Service established an administrative appeal process to resolve tax disputes without litigation. The Appeals mission is to resolve tax controversies, without litigation, on a basis that is fair and impartial to both the Government and the taxpayer. Local Appeals Officers have traditionally reported to different managers than the Service officials who proposed the adjustment. Appeals has historically been able to settle the vast majority of the cases that come within its jurisdiction.

The inventory of cases handled by Appeals falls into two major categories -- nondocketed and docketed -- determined by whether the case is pending in the United States Tax Court. Nondocketed cases typically involve an administrative protest by the taxpayer of the findings and conclusions of the Examination, Collection, or other IRS function that initially considers a taxpayer's case. The taxpayer's protest is typically followed by a conference, or series of conferences, with the taxpayer or the taxpayer's representative, during which Appeals and the taxpayer attempt to reach resolution of the issues in dispute. Docketed cases involve disputes where the taxpayer has filed a petition in the U.S. Tax Court, contesting a determination made by the Service in a statutory notice of deficiency. Following the filing of the petition, taxpayers who have not previously availed themselves of the opportunity for an Appeals conference generally are afforded an opportunity to resolve their case with Appeals before the case proceeds further in the litigation process. See generally Rev. Proc. 87-24, 1987-1 C.B. 720. In both types of disputes, Appeals has broad authority to negotiate settlements by applying a "hazards of litigation" standard.

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Proceedings before Appeals have traditionally followed a much less formal course than court proceedings. While proceedings before Appeals are designed to be fair and impartial, they are not subject to judicial rules of evidence or procedure. Some early legislative proposals during 1998 would have required Appeals to adopt more formal and less flexible processes. S. Rep. No. 1669, 105th Cong., 2nd Sess., § 304(a) (Feb. 24, 1998), would have established an independent Office of Appeals in the Internal Revenue Service, the head of which was to be appointed by and report directly to the Oversight Board. Further, this proposal would have barred Appeals from considering issues not “raised” by the originating function and prohibited “any communication” with the originating function unless the taxpayer or taxpayer’s representative had an opportunity to be present.

As ultimately enacted, § 1001(a)(4) of RRA 98 did not impose a comprehensive overhaul of Appeals’ processes. Instead, that section requires the IRS, as part of its reorganization plan, to establish an independent Office of Appeals “within the Internal Revenue Service.” The plan must prohibit ex parte communications “to the extent such communications appear to compromise the independence” of Appeals. When the evolution of § 1001(a)(4) of RRA 98 during the 1998 legislative process is considered in light of Appeals longstanding methods of operation, it can be fairly concluded that Appeals must be accorded a significant degree of independence from other IRS components, and should be mindful to avoid ex parte communications with other IRS functions that might appear to compromise that independence. The statutory provision cannot, however, be interpreted as mandating a major redesign of the fundamental

processes Appeals has traditionally followed to carry out its dispute resolution mission.

The procedures set forth in this Revenue Procedure are designed to accommodate the overall interests of tax administration, while preserving operational features that are vital to Appeals' case resolution processes within the structure of the IRS and ensuring more open lines of communication between Appeals and the taxpayer/representative. Thus, in order to preserve the informal give-and-take and flexibilities that have been conducive to achieving settlements in Appeals, the guidance provided in this revenue procedure does not adopt the formal ex parte procedures that would apply in a judicial proceeding. The guidance is designed to ensure the independence of the Appeals organization, while preserving the role of Appeals as a flexible administrative settlement authority, operating within the Internal Revenue Service's overall framework of tax administration responsibilities. For example, as more fully explained in Section 3 below:

- Appeals will retain procedures for (a) returning cases that are not ready for Appeals consideration, (b) raising certain new issues, and (c) seeking review and comments from the originating IRS function with respect to new information or evidence furnished by the taxpayer or representative.
- Appeals will continue to be able to obtain legal advice from the Office of Chief Counsel, subject to limitations designed to ensure that the advice to Appeals is not provided by the same field attorneys who previously gave advice on the same issue to the IRS officials who made the determination Appeals is reviewing. These limitations adopt some of the suggestions received in response to Notice 99-50 and reflect a balance between meeting Appeals'

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needs for legal assistance and avoiding ex parte communications that might appear to compromise Appeals' independence.

- Finally, the Revenue Procedure makes clear that the Commissioner and others responsible for overall IRS operations (including Appeals) may continue to communicate ex parte with Appeals in order to fulfill their responsibilities.

SECTION 3. GUIDANCE CONCERNING THE EX PARTE COMMUNICATIONS PROHIBITION DESCRIBED IN § 1001(a)(4) OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998

Q-1 What is "ex parte communication" and when is it prohibited?

A-1 For the purposes of this revenue procedure, ex parte communications are communications that take place between Appeals and another Service function without the participation of the taxpayer or the taxpayer's representative (taxpayer/representative). While the legislation refers to "appeals officers," the overall intent of the ex parte provision is to ensure the independence of the entire Appeals organization. Ex parte communications between any Appeals employee, e.g., Appeals Officers, Appeals Team Case Leaders, Appeals Tax Computation Specialists, and employees of other Internal Revenue Service offices are prohibited to the extent that such communications appear to compromise the independence of Appeals.

Q-2 Is the prohibition on ex parte communications limited to oral communications?

A-2 No. The prohibition is not limited to oral communications. It applies to any form of communication, oral or written (manually or computer generated).

Q-3 Are communications between Appeals Officers and other Appeals employees subject to the prohibition on ex parte communications?

A-3 No. As indicated in A-1 above, the ex parte communication prohibition was intended to preserve the independence of the Appeals organization as a whole. Intra-Appeals communications during the deliberation process do not compromise or appear to compromise that independence. Appeals employees may communicate freely with other Appeals employees without inviting the taxpayer/representative to participate.

Q-4 Is the administrative file transmitted to Appeals by the office that made the determination which is subject to the Appeals process (the originating function) considered to be an ex parte communication within the context of this revenue procedure?

A-4 No. The administrative file is not considered to be an ex parte communication within the context of this revenue procedure. The administrative file, containing the proposed determination and the taxpayer's protest or other approved means of communicating disagreement with the proposed determination, sets forth the boundaries of the dispute between the taxpayer and the Service and forms the basis for Appeals to assume jurisdiction.

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Q-5 Does the prohibition on ex parte communications extend to discussions between Appeals employees and the originating function during the course of preliminary review of a newly assigned case?

A-5 It depends on the nature of the communication. During the preliminary review of a newly assigned case, officials in Appeals may ask questions that involve ministerial, administrative, or procedural matters and do not address the substance of the issues or positions taken in the case. For example, Appeals employees may make the following types of inquiries without involving the taxpayer/representative:

- Questions about whether certain information was requested and whether it was received.
- Questions about whether a document referred to in the workpapers that the Appeals Officer cannot locate in the file is available.
- Questions to clarify the content of illegible documents or writings.
- Questions about case controls on the IRS's management information systems.
- Questions relating to tax calculations that are solely mathematical in nature.

Communications with the originating function which extend beyond matters of the type described above and address the substance of the issues in the case are prohibited unless the taxpayer is given the opportunity to participate.

Examples of prohibited communications include:

- Discussions about the accuracy of the facts presented by the taxpayer and the relative importance of the facts to the determination.

- Discussions of the relative merits or alternative legal interpretations of authorities cited in a protest or in a report prepared by the originating function.
- Discussions of the originating function's perception of the demeanor or credibility of the taxpayer or taxpayer's representative.

Q-6 Does the ex parte communications prohibition apply to Appeals consideration of cases which originated in the Collection function, e.g., collection due process (CDP) appeals, collection appeals program (CAP) cases, offers in compromise, trust fund recovery penalty cases, etc.?

A-6 Yes. The principles applicable to discussions between Appeals employees and officials in other originating functions also apply to discussions between Appeals and Collection employees. Appeals may not engage in discussions of the strengths and weaknesses of the issues and positions in the case, which would appear to compromise Appeals' independence. The taxpayer/representative should be given an opportunity to participate in any discussion that involves matters other than ministerial, administrative or procedural matters.

Section 3401 of RRA 98 (§§ 6320 and 6330 of the Internal Revenue Code), regarding due process in IRS collection actions, states that at a hearing, the Appeals Officer must obtain verification that the requirements of any applicable law or administrative procedure have been met. Communications seeking to verify compliance with legal and administrative requirements are similar to the ministerial, administrative or

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procedural inquiries discussed in A-5 above. Therefore, such communications are not subject to the prohibition on ex parte communications.

Q-7 Does the prohibition on ex parte communications change the criteria for premature referrals?

A-7 As a general rule, there is no change to current criteria or procedures. In essence, RRA 98 reinforces the instructions in Section 8.2.1.2 of the Internal Revenue Manual (IRM) and reaffirms Appeals' role as the settlement arm of the Service. If a case is not ready for Appeals consideration, Appeals may return it for further development or for other reasons described in IRM 8.2.1.2. Appeals may communicate with the originating function regarding the anticipated return of the case, but may not engage in a discussion of matters beyond the types of ministerial, administrative or procedural matters set forth in A-5 as part of a discussion of whether the premature referral guidelines require further activity by the originating function.

Q-8 Is there any change to the Appeals new issue policy?

A-8 No. The prohibition against ex parte communications does not affect Appeals' existing policy about raising new issues in Appeals. However, any new issue must first satisfy Appeals' new issue policy. New issues must continue to meet the "material" and "substantial" tests of IRM 8.6.1.4 and succeeding sections. If discussions with the originating function are needed in order to evaluate the strengths and weaknesses of the possible new issue, the taxpayer/representative must be given an opportunity to

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participate in such discussions. Appeals will continue to follow the principles of Policy Statement P-8-49 and the “General Guidelines” outlined in IRM 8.6.1.4.2 in deciding whether or not to raise a new issue.

Q-9 May Appeals continue to have ongoing communication with the originating function during the course of an appeal?

A-9 Yes. However, the prohibition on ex parte communications will affect the manner in which Appeals has traditionally operated during the course of the appeal. Appeals must give the taxpayer/representative the opportunity to participate in any discussions with the originating function which concern matters beyond the ministerial, administrative or procedural matters described in A-5 above.

Q-10 What should Appeals do if new information or evidence is submitted? Can Appeals still return the new material to the originating function for review and comment?

A-10 There is no change to existing procedures. The principles in IRM 8.2.1.2.2 remain in effect. The originating function should be given the opportunity to timely review and comment on significant new information presented by the taxpayer.

“Significant new information” is information of a non-routine nature which, in the judgment of Appeals, may have had an impact on the originating function's findings or which may impact on the Appeals' independent evaluation of the litigating hazards.

Generally, the review can be accomplished by sending the material to the originating function while Appeals retains jurisdiction of the case and proceeds with resolution of

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other issues. However, if it appears that important new information or evidence was purposely withheld from the originating function, the entire case should be returned to the originating function and jurisdiction relinquished pursuant to IRM 8.2.1.2.2(3). The taxpayer/representative must be notified when a case is returned to the originating function or new material not available during initial consideration has been sent to the originating function. The results of the originating function's review of the new information will be communicated to the taxpayer/representative.

Q-11 Does the prohibition on ex parte communications have any impact on the relationship between Appeals and Counsel?

A-11 Chief Counsel is the legal adviser to the Commissioner of Internal Revenue and his or her officers and employees (including employees of Appeals) on all matters pertaining to the interpretation, administration and enforcement of the internal revenue laws and related statutes. Attorneys in the Office of Chief Counsel are expected to provide legal advice based on a determination of "...the reasonable meaning of various Code provisions in light of the Congressional purpose in enacting them," without bias in favor of either the Government or the taxpayer. Rev. Proc. 64-22, 1964-1 C.B. 689. To balance Appeals employees' need to obtain legal advice with the requirement that they avoid ex parte communications that would appear to compromise Appeals' independence, the following limitations will apply to communications between Appeals employees and attorneys in the Office of Chief Counsel in cases not docketed in the United States Tax Court:

_ Appeals employees should not communicate ex parte regarding an issue in a case
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pending before them with Counsel field attorneys who have previously provided advice on that issue in the case to the IRS employees who made the determination Appeals is reviewing. Counsel will assign a different attorney to provide assistance to Appeals. If an Appeals employee believes it is necessary to seek advice from any Counsel field attorney who previously provided advice to the originating function regarding that issue in the case, the taxpayer/representative will be provided an opportunity to participate in any such communications.

- Appeals' requests for legal advice that raise questions that cannot be answered with a high degree of certainty by application of established principles of law to particular facts will be referred to the Chief Counsel National Office and will be handled as requests for field service advice or technical advice, as appropriate, in accordance with applicable procedures. The response of the National Office to Appeals will be disclosed to the taxpayer in accordance with § 6110.

Appeals employees are cautioned that, while they may obtain legal advice from the Office of Chief Counsel, they remain responsible for independently evaluating the strengths and weaknesses of the specific issues presented by the cases assigned to them, and for making independent judgments concerning the overall strengths and weaknesses of the cases and the hazards of litigation. Consistent with this assignment of responsibility, Counsel attorneys will not provide advice that includes recommendations of settlement ranges for an issue in a case pending before Appeals or for the case as a whole.

The foregoing limitations on ex parte communications do not apply to cases docketed in
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the United States Tax Court. Docketed cases will be handled in accordance with Rev. Proc. 87-24, 1987-1 C.B. 720, and the Tax Court Rules of Practice and Procedure.

Q-12 Appeals is required to submit certain cases to the Joint Committee on Taxation for review. On occasion, the Joint Committee (or its staff) will question a settlement or raise a new issue. Are communications with the Joint Committee (or its staff) covered by the ex parte communications prohibition?

A-12 No. The prohibition applies only to communications between Appeals and other Internal Revenue Service employees.

Q-13 Does the prohibition on ex parte communications have any impact on the requirement that Industry Specialization Program (ISP) issues in cases in Appeals jurisdiction be reviewed and approved by the Appeals ISP Coordinator?

A-13 No. Existing procedures for review and approval remain in place. The Appeals ISP Coordinator serves as a resource person for the Appeals organization. The purpose of the review is to ensure consistency of settlements and adherence to approved settlement guidelines. Communications between Appeals employees and the Appeals ISP Coordinator are entirely internal within Appeals, and consequently, the ex parte communications prohibition does not apply.

Q-14 Delegation Order 247, 1996-1 C.B. 356, gives Examination case managers limited settlement authority to resolve ISP coordinated issues which have Appeals Settlement Guidelines, provided that they secure the review and

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approval of both the Examination and Appeals ISP Coordinators. Would such communications constitute a violation of the ex-parte communications prohibition?

A-14 No. The purpose of the review is to ensure that the resolution by Examination fits within the guidelines developed by Appeals and that the application of the guidelines is consistent. The role of the Appeals ISP coordinator is directive in nature and has no impact on the independence of Appeals.

Q-15 Does the prohibition on ex parte communications apply in the context of meetings which include representatives from Appeals, Counsel, Collection and Examination (ACCE meetings), industry wide ISP coordination meetings, or meetings of Compliance Councils or the Large Case Policy Board?

A-15 Generally, no. Meetings of this type usually involve general discussions of how to handle technical issues or procedural matters. As long as the discussions do not identify specific taxpayers, the prohibition on ex parte communications would not apply. Participants in cross-functional meetings need to remain cognizant of the prohibition on ex parte communications and ensure that discussions do not appear to compromise the independence of Appeals.

Q-16 Does the prohibition on ex parte communications apply to communications between Appeals and the Commissioner or other Service officials who have overall supervisory responsibility for IRS operations?

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A-16 No. In accordance with § 7803, the Commissioner is responsible for managing and directing the administration of the internal revenue laws and tax conventions to which the United States is a party. In the course of exercising that statutory responsibility, the Commissioner and those officials, such as the Deputy Commissioner Operations, who have overall supervisory responsibility for IRS operations may communicate with Appeals about specific cases or issues and may direct that other IRS officials participate in meetings or discussions about such cases or issues without providing the taxpayer or representative an opportunity to participate.

Q-17 Does the prohibition on ex parte communications apply to discussions Appeals employees have with personnel in the IRS competent authority office regarding a taxpayer's request for relief under a tax treaty?

A-17 No. Communications between Appeals employees and IRS officials considering relief under competent authority procedures are not subject to the ex parte prohibitions because the Appeals Officer may assume that the competent authority is acting at the request, and with the consent, of the taxpayer.

Q-18 Does the prohibition on ex parte communications have any impact on Appeals communications with the Taxpayer Advocate Service (TAS) on an open case?

A-18 No. Communications by Appeals with the TAS that are initiated by the TAS are

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not subject to the prohibition because the Appeals Officer may assume that the TAS is acting at the request, and with the consent, of the taxpayer.

Q-19 Are communications between Appeals and outside consultants or experts under contract to the IRS subject to the ex parte communication prohibition?

A-19 Yes. Under the ex parte rules adopted here, outside consultants or experts under contract to the IRS (other than those employed directly by Appeals) will be treated as "other IRS employees." Therefore, the principles set forth in A-5 will apply. Appeals must give the taxpayer/representative the opportunity to participate in case-specific discussions that concern matters beyond the non-substantive ministerial, administrative or procedural matters described in A-5 above.

Q-20 A number of questions and answers have referred to communications with the "originating function." How is that term defined?

A-20 An "originating function" is an organization within the IRS that makes determinations which are subject to the Appeals process. For purposes of this revenue procedure, the term includes the Examination, Collection, Service Center, International, and Tax Exempt/Government Entities functions, or their successor organizations.

Q-21 Several responses in this document refer to the taxpayer/representative being given an "opportunity to participate." What does this phrase mean?

A-21 It means that the taxpayer/representative will be given a reasonable opportunity to attend a meeting or be a participant in a conference call between Appeals and the originating function when the strengths and weaknesses of issues or positions in the taxpayer's case are discussed. The taxpayer/representative will be notified of a scheduled meeting or conference call and invited to participate. If the taxpayer/representative is unable to participate at the scheduled time, reasonable accommodations will be made to reschedule. This does not mean that the Service will delay scheduling a meeting for a protracted period of time to accommodate the taxpayer/representative. Facts and circumstances will govern what constitutes a reasonable delay.

Q-22 May the taxpayer/representative waive the prohibition on ex parte communications?

A-22 Yes. If the taxpayer/representative is given an opportunity to participate in a discussion, but decides that such participation is unnecessary, the prohibition can be waived. Generally, a waiver will be granted on a communication-by-communication basis. However, if the taxpayer/representative so desires, the waiver could encompass all communications that might occur during the course of Appeals' consideration of a specified case. The Appeals Officer should document the waiver in the Case Activity Record.

Q-23 What if the taxpayer/representative declines to participate or seeks to delay

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the meeting/conference call beyond a reasonable time?

A-23 Appeals should proceed with the meeting or discussion and document the taxpayer/representative's declination or the reason for proceeding in the absence of the taxpayer/representative. This could be accomplished by

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